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SUPREME COURT U.S.

No. 81 5919

THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

EDWARD HAROLD SCHAD, JR., Petitioner,

v.

THE STATE OF ARIZONA, Respondent.

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF CHARLES ANTHONY SHAW

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's constitutional right of confrontation and cross-examination at the jury trial on the issue of guilt was abridged when the trial court admitted into evidence, over objection, certain testimony in a voluntariness suppression hearing transcript of a witness who was unavailable for trial when the Petitioner did not have a similar motive or meaningful opportunity to develop the testimony at the voluntariness hearing regarding the issue of guilt?

2. Whether the Petitioner had standing to object to the admission into evidence at his trial of items seized out of the automobile he was driving at the time of arrest when the search and seizure of such items was admittedly unconstitutional under the Fourth Amendment of the Constitution and when the police officers who conducted the search and seizure were under the belief at the time of the search and seizure that the automobile was stolen?

3. Whether the death sentence imposed violated the Eighth and Fourteenth Amendments of the Constitution because the Arizona Supreme Court here disallowed consideration by the sentencer of an alleged mitigating circumstance of "doubt of guilt for capital sentencing purposes in a circumstantial evidence case" unless the doubt of guilt was sufficient to set aside the verdict of conviction?

4. Whether the death sentence imposed violated the Eighth and Fourteenth Amendments of the Constitution because there is no indication that either the sentencer or the Arizona Supreme Court considered Petitioner's evidence that the one aggravating fact of a prior second degree murder conviction was an unfair conviction for the purpose of deciding whether the aggravating factor outweighed the mitigating factors?

. . .

5. Whether the death sentence imposed violated the Eighth Amendment of the Constitution and the Ex Post Facto Clause of the Constitution when the alleged crime occurred after the Arizona Supreme Court had declared the death penalty statute unconstitutional because it did not allow for sufficient mitigating circumstances in compliance with Lockett v. Ohio, 438 U.S. 586 (1978) and before the Arizona legislature enacted a new death penalty statute in compliance with Lockett, supra?

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OPINION BELOW

The opinion of the Supreme Court of Arizona (reproduced in Appendix I hereto) is reported at ___Ariz. ____, 633 P.2d 366 (1981). The order of the Supreme Court of Arizona denying a timely motion for rehearing is reproduced and attached hereto in Appendix II.

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on July 13, 1981. A timely motion for rehearing en banc was denied on September 10, 1981. This petition for certiorari is filed out of time pursuant to Rule 20, Rules of the Supreme Court of the United States, but such filing is not a jurisdictional defect since the time limits for filing in this case are not set by statute, but instead prescribed by Rules of the Supreme Court pursuant to 28 U.S.C. §2101(d). See, also, Taglianetti v. United States, 394 U.S. 316 (1969) and Durham v. United States, 401 U.S. 481 (1971). This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI, UNITED STATES CONSTITUTION -- JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT IV, UNITED STATES CONSTITUTION -- SEARCHES AND SEIZURES.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VIII, UNITED STATES CONSTITUTION -- EXCESSIVE BAIL, FINES, PUNISHMENTS.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV, UNITED STATES CONSTITUTION, SECTION 1 -- CITIZENSHIP: PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE I, SECTION 10, CLAUSE 1, UNITED STATES CONSTITUTION -- BILLS OF ATTAINDER; EX POST FACTO LAWS.

> No State shall . . . pass any Bill of Attainder, ex post facto Laws, ...

STATEMENT OF THE CASE

1. Brief Overview.

Petitioner was convicted of first-degree murder in Yavapai County, Arizona, and sentenced to death in late 1979. The case against Petitioner was entirely circumstantial. The victim was a 74-year-old man who apparently was traveling on the highways in Arizona from his home in Bisbee, Arizona, at the time of his death. The dead body was found on August 9, 1978, adjacent to a highway south of Prescott, Arizona, with a rope around the neck. The victim had last been seen alive leaving Bisbee, Arizona, in his new Cadillac automobile, pulling a camping trailer, on August 1, 1978.

Petitioner was arrested for parole violation in Salt Lake City, Utah, on September 8, 1978. He had been released on parole from the Utah State Penitentiary after having served nine years on a second-degree murder conviction. At the time of arrest, Petitioner was driving the Cadillac automobile which was later

proven to be that owned by the victim. The camping trailer was never located and its whereabouts are unknown. Petitioner had driven the Cadillac throughout the United States for approximately five weeks prior to his arrest, and Petitioner had used the victim's credit cards during this time. Petitioner also had a prior criminal record for forgery and auto theft.

Petitioner testified at trial that he had obtained the Cadillac from two French people on or about August 1, 1978, and that he had been introduced to these people by an escaped Utah prison inmate who had been known to Petitioner during Petitioner's previous confinement. Petitioner testified further that he had traded a stolen 1978 Ford Fairmont automobile to the French people for the Cadillac. Further circumstantial evidence against the Petitioner included the following: (1) The Fairmont was found abandoned off of a highway north of Flagstaff, Arizona, on August 3, 1978, containing one item of personal property which was identified at trial as being similar to an item owned previously by the victim; (2) Petitioner made several inconsistent statements to the authorities which included his Utah parole officer, Kent Jones, regarding how he acquired the Cadillac; (3) Numerous items of property identified as having been previously owned by the victim were found in the Cadillac by the police shortly after Petitioner's arrest.

The alternate juror who sat throughout Petitioner's jury trial, but who did not deliberate the case because he was chosen as the alternate, testified in a post-trial mitigation hearing that he had positively decided that Petitioner was not guilty. His reasons for positively entertaining a reasonable doubt of guilt were:

(1) Petitioner used the credit card very quickly in Arizona and did not have any cash; the murderer would not have taken a chance with the credit card so soon, and would have had

cash since the victim was known to be one who always carried around a large amount of cash and was known to have a large amount of cash when he left Bisbee.

(2) The State was unable to produce the camping trailer.

(3) Petitioner described the truck stop where the alleged transfer of the Ford for the Cadillac was made perfectly since the alternate juror knew this area well.

(4) Petitioner's demeanor on the witness stand was good despite the length of time and the emotional circumstances that occurred.

(5) Petitioner's fingerprints were not identified by experts at trial as being anywhere on the Ford Fairmont, and they particularly were not identified as being the identifiable fingerprints taken from the rear-view mirror; this fact was significant because the last driver of that automobile would have had to adjust the rear-view mirror.

(6) After the trial the alternate juror visited the scene of the discovery of the body and ascertained that it would have been very easy to hide that body so that nobody could have ever found it if it would have only been pushed twenty-five yards further down the hill from where it was; Petitioner had been presented to the jury as being smart enough to have done that if he had been the murderer.

2. Confrontation Problem.

At a suppression hearing prior to trial, parole officer Kent Jones testified regarding the voluntariness of Petitioner's statements to him. The issue at said hearing was whether or not Petitioner's statements were voluntary. Jones had also known Petitioner well because he had been a prison guard at the Utah State Penitentiary when Petitioner was incarcerated there.

Petitioner did not cross-examine Jones at said hearing concerning Jones' knowledge that Petitioner had extensive trouble at the Utah State Penitentiary regarding being labeled as a "snitch" because such testimony would not be relevant regarding the issue of whether his statements were voluntarily made. Petitioner desired to elicit such testimony from Mr. Jones at the trial because it would have been relevant on the issue of guilt since it would have corroborated his reasons for telling false stories to the authorities as to how he came into possession of the Cadillac which differed from his testimony at trial where he implicated an escaped Utah convict and the French people.

Kent Jones was involved in a serious accident shortly before the trial and was unavailable to testify. At trial the State was permitted, over objection of the defense, to read to the jury portions of the testimony of Jones regardings the inconsistent statements. Petitioner objected at trial to this evidence on the ground that he was unable to confront and cross-examine his accusers since he did not have a similar motive or a meaningful opportunity to develop the testimony at the voluntariness hearing regarding the issue of guilt. Despite this alleged violation of constitutional rights, the Arizona Supreme Court affirmed Petitioner's conviction without discussing contrary holdings of other federal courts of appeals on the issue raised.

3. Search of Cadillac Automobile.

After the arrest, Petitioner was taken to the Salt Lake County jail. The Cadillac automobile was impounded in the police impound yard. At the time of the arrest for parole violation, the police had no suspicion that the automobile was stolen or that a homicide had been committed. Later that day, the police began receiving information from other sources that the automobile may have belonged to a person in Arizona who had been

reported as missing. On this information, the police, without a warrant, conducted an extensive search of the Cadillac and trunk to include a search of boxes and bags found within the automobile, and numerous items of evidence were seized in that search which were used against Petitioner at trial.

Prior to trial, Petitioner had not admitted to any authority that the automobile had been stolen. In the trial court and the State Supreme Court, the State did not argue that the search and seizure was constitutional pursuant to the Fourth Amendment. The opinion of the Arizona Supreme Court does not hold that the search and seizure was constitutional. The search and seizure therefore was admittedly unconstitutional in violation of the Fourth Amendment.

However, the State in the trial court and before the Arizona Supreme Court argued that Petitioner did not have standing to raise violation of Fourth Amendment rights because the police would have thought at the time of the search that the automobile was stolen and that Petitioner was not the true owner of the automobile.

Petitioner's motion to suppress the evidence seized out of the Cadillac was denied on the ground of lack of standing by the trial court. Such decision was affirmed by the Arizona Supreme Court in spite of the fact that the Ninth U. S. Circuit Court of Appeals has clearly held that defendants in possession of stolen automobiles had standing to object to the seizure of items out of said automobiles on Fourth Amendment grounds. See, Cotton v. United States, 371 F.2d 385 (9th Cir. 1967). The Arizona Supreme Court below refused to follow the holding of Cotton v. United States, supra, for the reason that it felt this Court had expressed its disapproval of the result in Cotton in an obiter dicta statement found in a footnote of Rakas v. Illinois, 439 U.S. 128, 141 n. 9 (1978).

4. Doubt of Guilt for Sentencing Purposes.

In a post-trial mitigation hearing, Petitioner proffered the mitigating circumstance of "doubt of guilt for capital sentencing purposes in a circumstantial evidence case." To support such circumstance, Petitioner stressed the facts of the case and placed upon the witness stand the alternate juror. The trial court found that there was no mitigating circumstance of doubt of guilt. The Arizona Supreme Court held that, since there was sufficient evidence to support the verdict of guilt, there could be no mitigating circumstance regarding doubt of guilt. No guidance was given by the Arizona Supreme Court regarding the possibility of a mitigating circumstance in a capital case of doubt of guilt which nonetheless would not be enough doubt to set aside the verdict. Further, no guidance was given as to consideration of the serious evidence of the alternate juror.

5. Weighing the Aggravating Factor.

The sentencer found one aggravating factor, that being that Petitioner had previously been convicted of the crime of second-degree murder, which fit within two separate aggravating circumstances of the Arizona death penalty statute under which Petitioner was sentenced. The sentencer also found that the mitigating circumstances which were found to be true (that a felony murder instruction had been given at trial and that Petitioner had been a model prisoner) were not sufficient to outweigh the aggravating factor and thus the death penalty must be imposed. See, the Arizona death penalty statute under which Petitioner was sentenced as attached in Appendix III and the special verdict of the sentencer below regarding the imposition of the death penalty as attached in Appendix IV.

In the post-trial mitigation hearing, Petitioner presented evidence to the sentencer that the aggravating factor -- the second-degree murder conviction -- amounted to an unfair

conviction and that this fact should mitigate the aggravating factor so that it would more easily be outweighed by the mitigating factors. The evidence presented was that the only medical evidence available in the prior case proved that the death would have been as the result of an accident. Neither the sentencer nor the Arizona Supreme Court considered this evidence at all, and, therefore, there is no guidance as to whether a sentencer in a death penalty case can consider, in its weighing determination on whether to impose the death penalty, the fact that an aggravating factor such as a prior conviction should be given less weight than it ordinarily would be when weighed against the mitigating factors.

6. Ex Post Facto Problem.

On July 20, 1978, twelve days prior to the time of the alleged commission of the murder in this case, the Supreme Court of Arizona decided State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978) in which A.R.S. §13-454(F) (see, Appendix III) was held, insofar as it limits the right of a defendant to show additional mitigating circumstances, unconstitutional. The Arizona Supreme Court in Watson went on to hold that the unconstitutional portion of A.R.S. §13-454 is severable from the constitutional portion and that the death penalty was still viable in Arizona if trial courts, in mitigation hearings, considered the new judicially enacted mitigating circumstances as set forth in the Watson case. The Arizona Legislature enacted a new death penalty statute to be effective May 1, 1979, A.R.S. §13-703, which complied with Lockett v. Ohio, 438 U.S. 586 (1978) and State v. Watson, supra. Despite the fact that Petitioner was sentenced to death for a crime committed during a time when there was no properly enacted legislative death penalty statute, the death penalty of Petitioner was affirmed below by the Arizona Supreme Court.

REASONS FOR GRANTING THE WRIT

1. Petitioner was denied his constitutional right of confrontation and cross-examination at trial on the issue of guilt when the trial court admitted into evidence the suppression hearing transcript of Kent Jones over objection of the Petitioner.

The Arizona Supreme Court says in its opinion below that Petitioner had the opportunity and similar motive to develop Jones' testimony at the suppression hearing as he would have had at trial, and, therefore, the transcript was properly admitted under the Arizona hearsay exception rule. The desired testimony of Jones regarding the fact that Petitioner had been known as a "snitch" at the Utah State Penitentiary could not have been relevant to the issue at the voluntariness hearing and was not germane to the issue of whether statements to Jones were made freely. How this line of testimony can be considered relevant to the issue of whether the statements to Jones were made freely and voluntarily escapes counsel's comprehension.

This Court holds that the Confrontation Clause reflects a preference for face-to-face confrontation at trial and a primary interest secured by the clause is the right of cross-examination. Ohio v. Roberts, 448 U.S. 56 (1980). Furthermore, in Ohio v. Roberts, supra, and California v. Green, 399 U.S. 149 (1970) it was held that prior testimony in a criminal preliminary hearing can be used at trial if the declarant's statement at the preliminary hearing "had already been given under circumstances closely approximating those that surround the typical trial." The issue in the preliminary hearing is the same as the issue in the trial -- guilt of the defendant. The only difference is that the burden of proof on the State is much less at the preliminary

hearing than it is at trial. The issue in a voluntariness hearing -- voluntariness of statements only -- is certainly not the same as the issue at trial -- guilt. Thus, an important distinction exists in the case at bar with the facts and holding of Ohio v. Roberts, supra, and California v. Green, supra.

C. McCormick, EVIDENCE, §257 at 621-22 (2d ed. 1972) states that testimony at a former hearing can be used at trial only if there is a substantial identity of the issues in both hearings. Wigmore, EVIDENCE, §1387 (Chadbourne ed. 1974) states that "the issue on the occasion when the former testimony was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested by cross-examination upon the point now in issue." (Emphasis added). Wigmore further states that the aforementioned rule is nowhere disputed. If the issues are not the same in the two hearings then the cross-examiner would not have had "the realistic opportunity to cross-examine" in the former proceeding which is required by this Court in Mancusi v. Stubbs, 408 U.S. 204 (1972).

Other federal circuit courts of appeals have squarely ruled on this issue when the former testimony was given at a voluntariness suppression hearing rather than at a preliminary hearing. For instance, in United States v. Wingate, 520 F.2d 309, 315-16 (2d Cir. 1975), the defendant attempted to introduce into evidence the voluntariness suppression hearing testimony of his co-defendant as exculpatory evidence. The United States Court of Appeals for the 2d Circuit upheld the exclusion of this evidence because the issue at the suppression hearing was not whether the defendant was guilty or innocent, but rather whether the confession was made voluntarily; therefore, the Government had no meaningful opportunity to cross-examine the witness in the prior hearing on the issue of guilt of the defendant. Id. at

520 F.2d 316. Citing Wigmore, EVIDENCE, §§1386-87 (Chadbourne ed. 1974) and Federal Rules of Evidence 804(b)(1), the Wingate court held:

> "Testimony given at a previous trial or at a pre-trial hearing by a presently unavailable witness is inadmissible at a subsequent trial unless the issues in the two proceedings are sufficiently similar to assure that the opposing party had a meaningful opportunity to cross-examine when the testimony was first offered." Id.

Although in somewhat different circumstances, United States v. Zurosky, 614 F.2d 779, 791-793 (1st Cir. 1979) has followed the holding of Wingate regarding testimony at a former voluntariness hearing. This rule has more recently been followed by the Fifth U. S. Circuit Court of Appeals in United States v. Atkins, 618 F.2d 366 (5th Cir. 1980) where it was held that a declarant's testimony did not satisfy the former testimony rule because the cross-examiner did not have a similar motivation to question the declarant at the former hearing to determine admissibility of co-conspirators' statements as he would have at trial.

Petitioner's constitutional confrontation rights in this case have thus been violated because of the admission into evidence at his trial of former testimony from a voluntariness suppression hearing. This Court has not yet decided a case raising this issue with respect to voluntariness hearings. It is time now that it did, and Petitioner's conviction should be reversed on this ground.

2. Petitioner had standing to object to the admission into evidence at his trial of the items seized out of the automobile which he was driving at the time of arrest even though the police officers who conducted the search and seizure were under the belief at the time of the search and

seizure that the automobile may have been stolen.

Rakas v. Illinois, 439 U.S. 128, 148 (1978) holds that a defendant has standing to contest an unreasonable search and seizure of an automobile if he has "a legitimate expectation of privacy in the particular area of the automobile searched." Both the United States Court of Appeals for the 9th Circuit and the United States Court of Appeals for the 10th Circuit have clearly held that a person who possesses a stolen automobile at the time of the search also has standing to object to the lawfulness of the search of the automobile under the Fourth Amendment. See, Cotton v. United States, 371 F.2d 385, 390-91 (9th Cir. 1967); Simpson v. United States, 346 F.2d 291, 294 (10th Cir. 1965); United States v. Jamerson, 549 F.2d 1263, 1267-1269 (9th Cir. 1977). Jamerson even went so far as to hold that a defendant would have standing to object to a search which was made after the police had positively determined that the automobile was stolen and the true owner notified, a fact which was not known in the case at bar at the time of the search. The circuits are split on this issue because the 6th U. S. Circuit Court of Appeals and the 8th U. S. Circuit Court of Appeals have denied standing to defendants who are in possession of stolen automobiles. See, United States v. Kucinich, 404 F.2d 262 (6th Cir. 1968); Rodgers v. United States, 362 F.2d 358 (8th Cir. 1966).

In this case, the Supreme Court of Arizona rejected the holding of Cotton v. United States, supra, because it felt this Court disapproved the result in Cotton when it noted in obiter dicta in a footnote that several lower courts including Cotton had inexplicably held that a person present in a stolen automobile at the time of a search may object to the lawfulness of the search of the automobile despite the admonition in Jones v. United States, 362 U. S. 257 (1960) that "wrongful" presence at

the scene of a search would not enable a defendant to object to the legality of the search. Rakas v. Illinois, supra, at 439 U.S. 141 n. 9.

The flaw in the reasoning of the Arizona Supreme Court below is that the citation in Rakas is not a holding based upon the facts of the case. The 9th U. S. Circuit Court of Appeals did discuss the "wrongful" presence language of Jones v. United States, supra, in a way which surely does square the holding in Cotton with the holding of this Court in Jones. At pages 390-391, Cotton v. United States, supra, discusses this important distinction as follows:

> "The second ground upon which standing was established was that Jones had a sufficient interest in the premises searched. Jones' interest was possessory, and the court declined to allow decision to turn upon nice distinctions as to the nature of his possession, which appears to have been that of a guest or invitee. The court did, however, say that its ruling 'would * * * not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched.' (362 U.S. at 267, 80 S.Ct. at 734). The government relies upon this language as denying standing because Cotton's presence in the car was wrongful. We think that this goes too far. No doubt the Supreme Court would deny standing to a trespasser or a burglar who has entered another's home and is there when the home is searched. But even a trespasser, if he has also taken actual possession of premises, acquires possessory rights against all the world except the true owner. Thus a squatter upon the property of another, who builds a house there and lives there, has such rights, and we think that the Supreme Court would not deny them as against the lawless officer who breaks, enters and searches without a warrant.
>
> It has been repeatedly held, in substance, that an automobile has the status of a house, so far as the protection of the Fourth Amendment is concerned, subject to certain limitations arising from its mobility. See Carroll v. United States, 1925, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; Gambino v. United States, 1927, 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293; Brinegar v. United States, 1949, 338 U.S.

160, 69 S.Ct. 1302, 93 L.Ed. 1879; Henry v. United States, 1959, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed. 2d 134; Preston v. United States, 1964, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777; State of Montana v. Tomich, 9 Cir., 1964 332 F.2d 987. And the rule that one whose possession is wrongful is entitled to protection against all who do not have a paramount right to possession is equally applicable to chattels, such as a car. Thus, even a thief of a chattel can acquire title to it by adverse possession. Brown, Personal Property, 1955 ed., §17 at p. 38. The same rule applies to a finder, id., §11 at p. 23, even though, if he have the requisite intent, his possession may be larcenous, id. §15, at pp. 30-31. The car was not contraband. We do not intimate that the police may not, if they have probable cause, take a stolen car from the thief and return it to its owner. That question is not before us. The question here is as to the standing of the thief who had possession of it and claimed it as his own to object to a search of the car. We hold that he has such standing. To that extent, we are in agreement with the decision of the Tenth Circuit in Simpson v. United States, 1965, 346 F.2d 291."

More recently this Court has held in United States v. Salvucci, 448 U.S. 83 (1980) that questions of standing under the Fourth Amendment are decided "not by asking merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched." Just this summer, Robbins v. California, ____U.S. ___ 101 S.Ct. 2841 (1981) was decided which holds that persons do have a legitimate expectation of privacy in containers found within the trunk of a car stopped pursuant to an arrest. In the case at bar, Petitioner claimed as his certain items which were seized out of the Cadillac and used against him at trial such as the license plates found in the locked trunk of the Cadillac; a box of groceries, various tool boxes, various other small metal boxes with credit card slips contained therein all found in the back seat of the Cadillac. With regard to these items it never was established in the courts below that they were not legitimately

owned by the Petitioner and thus under all interpretations of the Fourth Amendment standing requirements, Petitioner should have standing to object to the unlawful search and seizure of these items.

The issue raised here is one in dispute amoung four federal circuit courts of appeals and the Arizona Supreme Court below. This Court should therefore grant the petition for writ of certiorari to settle the issue and thereafter reverse Petitioner's conviction on the ground that he does have standing to raise the clear violation here of the Fourth Amendment.

3. The death sentence violated Petitioner's Eighth and Fourteenth Amendment rights because the Arizona Supreme Court disallowed consideration by the sentencer of the mitigating circumstance of "doubt of guilt for capital sentencing purposes in a circumstantial evidence case."

The Arizona Supreme Court clearly held below that this alleged mitigating circumstance was not even available to the Petitioner because his claim of doubt was not substantial enough to set aside the verdict in accordance with the rule established by this Court in Jackson v. Virginia, 443 U.S. 307 (1979). Thus, the testimony of the alternate juror and any other questions about the verdict raised by the circumstantial nature of the case were ignored in the sentencing. Such a callous denial of mitigation rights to the Petitioner violates this Court's proscription in Godfrey v. Georgia, 446 U.S. 420, 428 (1980) that a state who wishes to authorize capital punishment "has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." The state "must channel the sentencer's discretion by 'clear and objective standards' that provide

'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, supra. Furthermore, Godfrey holds that "a capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" Id.

Lockett v. Ohio, 438 U.S. 586, 601 (1978) holds that it is an indispensable part of the process of inflicting the penalty of death to consider the "circumstances of the particular offense." Lockett further held at 438 U.S. 604 "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Petitioner should have the right to present as a mitigating factor the question of doubt of guilt and the alternate juror's testimony thereon even though such doubt would not be enough to set aside the verdict of guilt. The death penalty should not be imposed unless we can be very certain the defendant is guilty! The Arizona Supreme Court below has significantly foreclosed this mitigating circumstance, and thus the proscription of Lockett has been violated.

An alternate juror sat through this trial and concluded Petitioner was not guilty. Such fact is irrelevant regarding whether there is sufficient evidence to support the verdict. However, such fact cannot be ignored when deciding to impose the ultimate and extreme penalty of death! This fact and the circumstances of this case should be considered as mitigating factors to also be weighed against the aggravating factor.

4. The death sentence imposed violated the Eighth and Fourteenth Amendments of the

Constitution because there is no indication that either the sentencer or the Arizona Supreme Court considered the Petitioner's evidence that the one aggravating fact of a prior second-degree murder conviction was an unfair conviction for the purpose of deciding whether the aggravating factor outweighed the mitigating factors.

The evidence proffered by Petitioner that the aggravating factor is weak should in fact be considered when weighing the mitigating factors against this aggravating factor. This fact constitutes "an aspect of the defendant's character or record" of the holding of Lockett v. Ohio, supra, and therefore this factor should also be considered by the sentencer. The foreclosing of such consideration by the sentencer in this case and the Arizona Supreme Court below again violates Lockett v. Ohio and constitutes an unconstitutional death sentence.

5. The death sentence imposed violated the Eighth Amendment of the Constitution and Ex Post Facto Clause of the Constitution because the Arizona Sentencing Statute could only have allowed for the penalty of life imprisonment.

This issue is presently under consideration by the United States Court of Appeals for the Ninth Circuit in John Henry Knapp, et. al. v. Harold Cardwell, et. al., 9th U.S. Circuit Court of Appeals No. 80-5419. Petitioner's argument will thus be brief.

The Arizona Supreme Court in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978) attempted to judicially rewrite the Arizona death penalty statute by stating that the statute

allowed defendants to provide any evidence of mitigation in conformance with Lockett v. Ohio, supra. Such judicial rewriting of the death penalty statute is violative of the Eighth Amendment of the Constitution and is thus void. Gregg v. Georgia, 428 U.S. 153, 175-76 (1976); In re Bonner, 151 U.S. 242, 259 (1894).

The Arizona Supreme Court in Watson attempted to argue that they really were not holding the death penalty statute unconstitutional because it did not allow for consideration of all mitigating circumstances, but that they were instead declaring the law as it always was because "[d]efendants in Arizona have always had the right to present any evidence in mitigation...." 586 P.2d at 1257. Yet, less than two years before in State v. Richmond, 114 Ariz. 186, 560 P.2d 41, 50 (1976), the Arizona Supreme Court had said that the only mitigating circumstances allowed in death penalty cases were those four specific ones as identified in A.R.S. §13-454(F), see Appendix III.

At the time of the decision in State v. Watson, supra, the Arizona Legislature had provided in Chapter 138, ARIZONA Laws 1973, §10 as follows:

> "In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first-degree murder or other offense punishable by death who has been sentenced to die, shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of twenty-five calendar years."

Thus, on August 1, 1978, when the alleged murder for which Petitioner was convicted occurred, there was no valid death penalty in Arizona. At that time, the penalty for first-degree murder in Arizona was life imprisonment without possibility of parole for at least twenty-five years.

As shown by the sentencer in the case at bar in the special verdict as annexed hereto in Appendix IV, Petitioner was sentenced under Arizona's old death penalty statute and not

under the new death penalty statute which became effective May 1, 1979. Since the penalty in Arizona for first-degree murder at the time the alleged murder was committed could be no more than life imprisonment, Petitioner cannot be sentenced to death under the new statute providing for Lockett v. Ohio mandated mitigating circumstances because there would be an ex post facto violation prohibited by Article I, §10 of the United States Constitution. Citing Beazelle v. Ohio, 269 U.S. 167, 169-70 (1925), Dobbert v. Florida, 432 U.S. 282, 292 (1977) held as follows:

> "It is settled by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed which was innocent when done; which makes more burdensome the punishment for a crime after its commission; or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."

See, also, Calder v. Bull, 3 U.S. (3 Dall.) 385, 390, 1 L.Ed. 648 (1798); Malloy v. South Carolina, 237 U.S. 180, 183-85 (1915); Lindsey v. Washington, 301 U.S. 397, 401 (1936).

For the foregoing reasons, Petitioner's sentence of death should be reduced to life imprisonment because the Arizona penalty for the crime of first-degree murder at the time of the alleged crime in this case could only have warranted a maximum punishment of life imprisonment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arizona.

RESPECTFULLY SUBMITTED this 16TH day of December, 1981.

LAW OFFICES OF CHARLES ANTHONY SHAW

By Charles Anthony Shaw
Charles Anthony Shaw
Attorney for Petitioner

APPENDIX I

(Opinion of Arizona Supreme Court)

RECEIVED JUL 23 1981

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

FILED
JUL 13 1981
S. ALAN COOK
CLERK SUPREME COURT
BY

STATE OF ARIZONA,
Appellee,
v.
EDWARD HAROLD SCHAD, JR.,
Appellant.

No. 4876

Appeal from the Superior Court of Yavapai County
The Honorable Paul G. Rosenblatt, Judge
(Cause No. 8752)
AFFIRMED

Robert K. Corbin
The Attorney General
By William J. Schafer III
and David R. Cole
Assistant Attorneys General — Phoenix
Attorneys for Appellee

Charles Anthony Shaw — Prescott
Attorney for Appellant

HAYS, Justice

The appellant, Edward Harold Schad, Jr. (hereinafter defendant), was convicted by a Yavapai County jury of first degree murder and was sentenced to death. Defendant now appeals both the conviction and the sentence. We have jurisdiction pursuant to A.R.S. § 13-4031. Judgment of conviction and sentence affirmed.

The facts of this case are rather complicated. Accordingly, general facts surrounding the crime will be provided here and other facts which are necessary for resolution of the issues

raised by defendant will be developed within the opinion.

On August 9, 1978, a badly decomposed body of an elderly male was found approximately nine miles south of Prescott, Arizona, adjacent to a roadway pull-off on U. S. Highway 89. The body was discovered after a highway department worker had detected the odor of decaying human flesh the previous day while driving past the pull-off. Although the worker and his coworker had stopped briefly to investigate the odor on August 8, the body was not actually discovered until the next day due to the fact that it was well concealed in the brush. After the corpse was discovered, the Yavapai County Sheriff's Department and the County Medical Examiner observed a small rope tied around the victim's neck. It was later established that the cause of death was strangulation.

Because of the advanced state of decomposition, the body was not identified until October 11, 1978, when it was established that the deceased was Lorimer "Leroy" Grove, a 74-year-old Bisbee resident. Grove had last been seen on August 1, 1978, in Bisbee, Arizona. On that morning, Grove left Bisbee driving a new Cadillac, pulling a camper-trailer. His ultimate destination was Everett, Washington, where he had intended to visit his sister.

On August 3, 1978, a dark green Ford Fairmont was found abandoned 30 miles north of Flagstaff, Arizona, alongside U. S. Highway 89 by a Department of Public Safety Highway Patrolman. It was subsequently determined that the Fairmont had been rented by the defendant from a Ford dealership in Sandy, Utah, on December 31, 1977. Although the vehicle had been rented for the weekend, it was never returned and had been reported as stolen. The vehicle was turned over to

the Coconino County Sheriff's Department and was impounded at a local towing yard. On September 12, 1978, two officers examined the vehicle in connection with an investigation of possible homicide charges against defendant. Several items belonging to the victim were found in the Fairmont, including a mirror device which was identified as being similar to one used by the deceased to hook the trailer to the automobile by himself.

On September 3, 1978, defendant was stopped by a New York Highway Trooper, for speeding, while driving the victim's Cadillac. When the defendant could not produce a registration on the vehicle, the officer asked for an explanation. Defendant replied that it wasn't his car but that he was delivering it for a friend to an area five or ten miles from where the officer stopped him. Asked who the friend was, defendant said he was an elderly gentleman by the name of Larry Grove.

Defendant was arrested in Salt Lake City, Utah, on September 8, 1978, for parole violation. Defendant had been on parole from the Utah State Penitentiary where he had been serving a sentence for a second degree murder conviction. After defendant was arrested and taken into custody, the Cadillac was taken to the Salt Lake City Police Department impound lot where it was searched. Various personal items were found in the car which were identified as belonging to the victim.

Defendant raises the following arguments for our consideration:

1. The warrantless search of the Cadillac and defendant's wallet violated defendant's fourth amendment rights;

2. An informant's testimony regarding statements made by defendant while in jail violated defendant's sixth amendment rights;

3. Statements made to various police officers were involuntary;

4. The trial court improperly restricted voir dire questioning of the jury;

5. The jury should have been sequestered;

6. Defendant was denied his right of confrontation under the sixth amendment when the trial court admitted into evidence portions of the suppression hearing transcript concerning written and oral statements of the defendant;

7. Defendant's prior prison record should have been admitted;

8. The State deprived defendant of a fair trial by failing to make a good-faith effort to obtain fingerprints of the "French people";

9. The trial court abused its discretion in admitting a photograph of the deceased;

10. The evidence was insufficient to support the conviction;

11. The trial court improperly instructed the jury;

12. The death penalty was not properly imposed;

13. A.R.S. § 13-454 is unconstitutional in this case.

SEARCH OF CADILLAC AND WALLET

Defendant's first point deals with the trial court's refusal to suppress evidence seized from the warrantless searches of defendant's wallet and the Cadillac. We turn first to the evidence obtained from defendant's wallet.

At the time of arrest, defendant was immediately taken into custody and transported to jail. Wilma Horrocks, who

was present at the scene of arrest and had been cohabiting with defendant during the preceding year, was asked by defendant to pick up his personal belongings from the jail. Among these items was defendant's wallet which contained two VISA credit cards belonging to the murder victim. At the jail, the police inexplicably released the wallet to Horrocks without examining the contents. On the following day, after being informed that the wallet contained stolen credit cards, Detective John Johnson of the Salt Lake City Police Department went to Horrocks' residence in order to try to obtain the credit cards. Once there, Johnson asked Horrocks if she had two stolen credit cards; she answered that she did, retrieved the wallet and gave the cards to Johnson. No warrant was obtained to seize the cards.

Defendant maintains that because the wallet was released to his girlfriend at her request and upon his instructions, defendant had a legitimate expectation of privacy in its contents. Therefore, defendant argues he has standing to object to the "unlawful" search of his wallet without a warrant even though it was in the custody of his girlfriend.

It is undisputed that searches and seizures that may be made at the time of arrest may be legally conducted later when the accused arrives at the place of detention. United States v. Edwards, 415 U.S. 800, 94 S. Ct. 1234 (1974). Thus, at the time defendant was taken into custody, the police would have been acting well within their permissible authority under the fourth and fourteenth amendments had they conducted a search of the wallet at the jail. Admittedly, in this case the police neglected to do this

and instead turned the wallet and its contents over to Horrocks. We need not decide whether this gave rise to a legitimate expectation of privacy in the contents of the wallet, however, since Horrocks consented to the search and voluntarily turned over the credit cards to Detective Johnson.

It is well settled that a warrantless search of property is valid if conducted pursuant to a voluntary consent. United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988 (1974); State v. Tucker, 118 Ariz. 76, 78, 574 P.2d 1295, 1297 (1978), cert. denied, 439 U.S. 846, 99 S. Ct. 144 (1978). "A consent to search may be evidenced by conduct as well as by words. However, the constitutional protection against unreasonable searches demands a waiver by unequivocal words or conduct expressing consent." State v. Tucker, supra, 118 Ariz. at 78-79, 574 P.2d at 1297-98. These same principles apply where the consent is given by one who possesses common authority over the premises or effects. In such a situation, the consent is valid as against the absent, nonconsenting person with whom that authority is shared. United States v. Matlock, supra, 415 U.S. at 171, 94 S. Ct. at 993.

In the present case it is clear that Horrocks had the authority to consent to the search of the wallet and seizure of the credit cards. The wallet was released to her at defendant's request. By allowing her to take possession and control of the wallet, defendant "assumed the risk" that she would allow someone else to have the contents, here the stolen credit cards. United States v. Matlock, supra; United States v. Miroff, 606 F.2d 777, 779 (7th Cir. 1979).

We also find the consent to the search to have been voluntarily given. There were no overt acts or threats of force by Detective Johnson nor were there any indications of more subtle forms of coercion. Detective Johnson testified that he had no intention to search for the cards, and, if Horrocks had refused to give them to him, he would have left the premises. Horrocks' testimony does not dispute this. The conclusion that her consent was voluntary is also bolstered by the fact that she brought the wallet to the police station a week later and turned it over to Detective Johnson.

Defendant also argues that since he had been driving the Cadillac for the previous six weeks, he had standing to assert a legitimate expectation of privacy regarding the seized contents of the Cadillac. In support of this contention, defendant relies heavily on Cotton v. United States, 371 F.2d 385 (9th Cir. 1967), which held that a thief who had possession of a stolen automobile and claimed it as his own had standing to object to a search of the car.

We do not find Cotton to be persuasive in light of Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421 (1978), where the Supreme Court held that the defendants did not have standing to challenge a search of the automobile in which they were riding as passengers. In so holding, the Court noted that a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. 439 U.S. at 143 n. 12, 99 S. Ct. at 430-31. We find especially significant the fact that the Court in Rakas expressed its disapproval of the result in Cotton. After emphasizing that the Court in Jones v. United States,

362 U.S. 257, 80 S. Ct. 725 (1960), was careful to note that "wrongful" presence at the scene of a search would not enable a defendant to object to the legality of the search, the Court went on to observe that "[d]espite this clear statement in Jones, several lower courts inexplicably have held that a person present in a stolen automobile at the time of a search may object to the lawfulness of the search of the automobile. See, e.g., Cotton v. United States (citation omitted) . . ." 439 U.S. at 141 n. 9, 99 S. Ct. at 429.

Similarly, this court has refused to recognize as "reasonable" any expectation of privacy a thief may have in an automobile which he has stolen. State v. Meyers, 117 Ariz. 79, 570 P.2d 1252 (1977), cert. denied, 435 U.S. 928, 98 S. Ct. 1498 (1978). Defendant attempts to distinguish Meyers by pointing to the fact that the stolen automobile in that case had been abandoned. Further, defendant asserts that because there were numerous items of his own property located in the Cadillac he had an expectation of privacy in the automobile.

We do not view Meyers so narrowly. We cannot see how lack of abandonment of a stolen vehicle, coupled with the fact that the thief may have some of his own property in the automobile, can elevate defendant's standing to object to a warrantless search. The capacity to claim the protection of the fourth amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. Rakas v. Illinois, supra, 439 U.S. at 143, 99 S. Ct. at 430; Katz v. United States, 389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967). Clearly,

defendant's expectation is not one that society is prepared to recognize as reasonable, nor are we. See also Rawlings v. Kentucky, 448 U.S. 98, 100 S. Ct. 2556 (1980) (defendant not entitled to challenge search of woman's purse merely because he claimed ownership of drugs in the purse). The items taken from the Cadillac were properly admitted into evidence.

INFORMANT'S TESTIMONY IN RE STATEMENTS MADE BY DEFENDANT WHILE IN JAIL

The Salt Lake City Police learned of defendant's presence in Salt Lake City from information supplied by John Duncan. Duncan had been arrested by Detective Halterman of the Salt Lake City Police Department on a California fugitive warrant but had fought extradition and was eventually released by the Utah authorities. Afterwards, Duncan and his wife were living with Wilma Horrocks when defendant arrived in town driving the victim's Cadillac.

Defendant told Duncan that he was a parole violator and wanted to know the fastest way out of town after his visit with Horrocks. Duncan then informed Detective Halterman of defendant's presence. Halterman checked Duncan's information and discovered that defendant was indeed a parole violator. Duncan told Halterman where defendant had parked the Cadillac, and Halterman arranged for defendant's arrest the next morning. After defendant was arrested as he was attempting to leave town, Duncan contacted Halterman several more times. On these occasions, Duncan told Halterman about the stolen credit cards in defendant's wallet and about some credit card receipts Duncan had recovered. He later turned these receipts over to Halterman. These contacts were all initiated by Duncan. The

police did not direct Duncan's activities nor did they pay Duncan for the information.

Several days later, Duncan volunteered to visit defendant in jail and offered to report the conversation to the police. After this was considered by the police and prosecutorial officials, however, the idea was rejected. Detective Halterman summarized this decision at the suppression hearing:

> "Q. Was there ever any discussion with [Duncan] as to his talking to Ed Schad and relaying any information that he might learn from him to you or any other officer?
>
> "A. There was -- that point was brought up at one time I believe, by Mr. Duncan and I with my captain and also the County Attorney concerning that and determined that that would not be a good idea, and that was discussed and that information was relayed to Mr. Duncan.
>
> "Q. What was Mr. Duncan's reaction, if any?
>
> "A. That he still was an acquaintance of Mr. Schad and that he would -- if he wanted to visit him he could visit him, I mean, we didn't have the right to tell him he couldn't but that was about it.
>
> "Q. Then do you know whether he did visit him or not?
>
> "A. I believe he did.
>
> "Q. Did Mr. Duncan ever talk to you or tell you what came about from such a visit, if anything?
>
> "A. It seems like he told me that he talked to him and told Mr. Schad that the Police Department had the credit cards at that time, and I believe he asked Mr. Schad where the trailer was and Mr. Schad would not tell him.
>
> "Q. That is all the information that you learned from Mr. Duncan in regard to that visit?
>
> "A. Yes."

Although Duncan wanted "some help from the police"

with regard to his California parole violation, this help did not amount to more than a promise from Detective Halterman that he would write a letter to Duncan's judge in California relating Duncan's assistance in the investigation. At the time of trial, Duncan was still serving a sentence in Chino State Prison, California.

Based upon the foregoing, defendant contends that Duncan was acting as an agent for the State and was soliciting information by trickery, in violation of defendant's sixth amendment right to counsel. In advancing this position, defendant argues that State v. Smith, 107 Ariz. 100, 482 P.2d 863 (1971), controls the facts of the present case. We cannot agree.

In State v. Smith, supra, this court was presented with facts which indicated an agency relationship existed between an informant and the Maricopa County Attorney's Office. The court summarized the facts leading to this conclusion as follows:

> "Mahan was a known informer used by the County Attorney on a previous occasion, with the express understanding that in exchange for testimony, parole for Mahan would be obtained; out of 350-400 inmates in the Maricopa County Jail, the defendant was placed next to this known informer; the County Attorney's office had the power to control the placement of inmates; following the performance by Mahan of all the services required of him in connection with his prior activities, he was allowed to remain in the Maricopa County Jail for six months; the notes delivered to the County Attorney's office were specifically marked in such a manner as would require Mahan's testimony at defendant's trial; and notes were made by [the County Attorney] of defendant's oral conversations with Mahan, again indicating the necessity of Mahan's appearance at trial."
> 107 Ariz. at 103, 482 P.2d at 866.

Additionally, after obtaining the evidence from Mahan

concerning the defendant, Mahan's robbery conviction was reduced to grand theft and he was resentenced to time served and released. "In other words Mahan received his quid pro quo." Id. at 104, 482 P.2d at 867. Under these circumstances, this court held that the notes obtained by the informant from the defendant were inadmissible under the doctrine of Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964).[1]

Turning to the facts of the present case, we hold that there was no agency relationship between Duncan and the Utah authorities. There was obviously no "quid pro quo" for Duncan's assistance. Duncan initiated the contacts with the police and did so without any tangible promise of pecuniary gain or prospect of release from prison. Additionally, there were no concerted actions on the part of the police aimed at priming Duncan as a witness against defendant at trial, as evidenced by the unwillingness of the authorities to deliberately elicit incriminating statements from defendant during the suggested jail visit.

As we pointed out in Smith,

> "it should be emphasized that law enforcement officials have the right, and indeed the obligation in the prosecution of crimes to use all information that comes into their hands pointing to the guilt of the accused. This is true even though the persons supplying that information may harbor expressed or unexpressed motives of expectation of lenient treatment in exchange for such information.

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[1] More recently, the United States Supreme Court in United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183 (1980), has identified three factors in determining whether a government agent is deliberately eliciting incriminating statements from the accused within the meaning of Massiah. First, the agent must be acting under instructions as a paid informant for the government; second, the informant is ostensibly no more than a fellow inmate of the accused; and third, the defendant is in custody and under indictment at the time he is engaged in conversation by the informant. 447 U.S. at 270, 100 S. Ct. at 2186. However, we do not believe that any of these factors are applicable to the present case.

> It is only when the state actively enters into the picture to obtain the desired information in contravention of constitutionally protected rights that the sanction of inadmissibility becomes pertinent." 107 Ariz. at 103, 482 P.2d at 866.

Regardless of Duncan's motivations in aiding the police, we cannot say that the police "actively entered into the picture" so as to give rise to an agency relationship. When viewed along with the fact that the information gained through the jail conversation was insignificant, it is apparent that the trial court did not err in denying defendant's motion to suppress the statements.

VOLUNTARINESS OF STATEMENTS MADE TO POLICE OFFICERS

Defendant next argues that the trial court erred in admitting certain statements made to Salt Lake City, Utah, and Yavapai County law enforcement officers. Defendant does not contend that these statements were obtained in violation of his Miranda[2] rights but asserts the statements were involuntary under A.R.S. § 13-3988(B)(1) and (2).[3] Relying on the statute, defendant claims his statements were involuntary because 1) they were made during an unreasonable length of

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[2] 384 U.S. 436, 86 S. Ct. 1602 (1966).

[3] A.R.S. § 13-3988(B)(1) and (2) provides:

> "The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including but not limited to the following:
>
> 1. The time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment.
>
> 2. Whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession.

time between his arrest for parole violation on September 8, 1978, and the arraignment on the murder charge on March 21, 1979, and 2) that because he was arrested on the parole violation charge, he did not know the nature of the offense for which he was charged nor of which he was suspected at the time of making the statements.

We have repeatedly stated that confessions are prima facie involuntary and the burden is on the State to show that they were freely and voluntarily made, and that they were not the product of physical or psychological coercion. State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980); State v. Hall, 120 Ariz. 454, 586 P.2d 1266 (1978); State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978). Although the statements at issue do not rise to the level of a confession, they served to destroy the defendant's credibility as a witness on his own behalf; therefore, if the statements were involuntary, their use against the defendant at trial would be a denial of due process. See Mincey v. Arizona, 437 U.S. 385, 398, 98 S. Ct. 2408, 2416 (1978). Accordingly, the State must shoulder the same burden in showing that these statements were not the product of physical or psychological coercion.

As to defendant's first contention that his statements were involuntary because of the delay between the time of arrest and his first appearance before a magistrate, we have observed that "such a delay is but a factor to be considered and does not ipso facto render such statements involuntary." State v. Arnett, supra, 119 Ariz. at 44, 579 P.2d at 548. Here, defendant does not claim he was subjected to any such practices, but merely points to the time span and the fact

that he was not transferred from the Salt Lake County Jail to the Utah State Penitentiary as would be the normal practice for a prisoner facing a parole revocation hearing. We do not see how this different procedure made defendant's statements involuntary and must uphold the trial court's determination on this point.

We also find defendant's second contention that he did not know the nature of the offense for which he was charged or suspected to be wholly unsupported by the record. On September 12, 1978, Officer Jones asked defendant a number of questions concerning the Cadillac and specifically asked defendant if he knew Larry Grove. On September 19, 1978, Jones told defendant that he thought defendant was involved in the death of Grove. This line of inquiry obviously put defendant on notice that he was a murder suspect, especially in light of the fact that defendant, a habitual criminal, was no stranger to the criminal justice system. The trial court was correct in denying defendant's motion to suppress the statements.

REFUSAL TO USE DEFENDANT'S REQUESTED VOIR DIRE QUESTIONS

Defendant contends that the trial court erred in refusing to ask certain questions submitted by defendant during the voir dire examination. The submitted questions concerned:

1) whether any prospective juror had any conscientious or religious opinions concerning the death penalty;

2) whether the prospective jurors or family members had any knowledge of correctional institutions or parole;

3) whether the prospective juror would have convicted defendant because of his involvement in other crimes;

4) whether the prospective jurors or any family members were personal friends or acquaintances of any other persons serving on the jury panel; and

5) whether the prospective jurors had any disagreement with the law of murder or the law of the alibi defense.

In discussing procedures for selecting a jury in a criminal trial pursuant to 17 A.R.S. Rules of Criminal Procedure, rule 18.5, we have emphasized that the rule

> "places the responsibility for conducting voir dire examination of the prospective jurors on the court . . . . The purpose behind the provisions of Rule 18.5 is to give the trial court authority to limit the scope of examination to those questions reasonably designed to expose possible prejudice on the part of the jurors."

State v. Melendez, 121 Ariz. 1, 3, 588 P.2d 294, 296 (1978). "While it is the court's duty to question potential jurors, the extent of voir dire examination to determine the presence or absence of prejudice is left to the sound discretion of the trial court." State v. Smith, 114 Ariz. 415, 418, 561 P.2d 739, 742 (1977). We have reviewed the voir dire examination conducted by the trial court and find that the court adequately questioned the prospective jurors so as to have enabled the parties to exercise intelligently their peremptory challenges and challenges for cause.

The trial court propounded questions which more than adequately dealt with the area of concern touched upon by defendant's capital punishment question. This is evidenced by the fact that one prospective juror indicated that he had "a strong objection to capital punishment." After listening to the ensuing discussion which occurred between the court and the prospective juror, no other prospective jurors indicated they had any opinions which would prevent them

from reaching a just verdict.

Similarly, defendant's second proposed question was properly refused. Defendant claims this question was necessary because defendant had a right to know if any prospective juror was an "expert" on the subject of prisons, correctional institutions and parole. The trial court refused this question in light of the fact that information relating to present or past occupations was elicited from the prospective jury members.

Defendant's third proposed question constitutes an attempt to "condition" the jurors by forewarning them of unfavorable facts concerning defendant. We have disapproved of this practice in Melendez, supra, and find no error in the trial court's refusal to give this question.

Finally, defendant argues that the fourth and fifth proposed questions were necessary in order to allow him to intelligently exercise his peremptory challenges. In both instances, defendant assumes this information would inform him whether a prospective juror would be more likely than other jurors to violate the court's admonitions and instructions. With respect to the fourth question, we find such an inference to be tenuous, at best. Furthermore, there is no presumption that jurors will disobey instructions given them by the court. State v. Trujillo, 120 Ariz. 527, 587 P.2d 246 (1978). It was not error to refuse to ask the requested questions.

JURY SEQUESTRATION

Defendant argues that the trial court erred when it denied his motion to sequester the jury. Specifically, defendant points to the fact that there were various newspaper

articles published concerning the case which mentioned defendant's prior conviction for second degree murder.

While conducting the voir dire, the trial court carefully inquired whether any prospective juror had been exposed to any media coverage concerning the case. This inquiry led to the disqualification of one prospective juror. Immediately after the jury was selected and during the course of the trial, the court repeatedly admonished the jurors not to read or listen to any accounts that may appear in the media.

The decision to sequester the jury is within the discretion of the trial court and as such will not be disturbed on appeal absent a clear showing of abuse of discretion and resulting prejudice to defendant. State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). In claiming that the trial court erred in refusing to sequester the jury, the burden of proving that publicity actually prejudiced the jury is on the defendant. See State v. Lippard, 26 Ariz. App. 417, 549 P.2d 197 (1976). This the defendant has not done. Accordingly, we will not disturb the trial court's discretion in this matter on appeal. State v. Greenawalt, supra, ____ Ariz. at ____, 624 P.2d at 840.

RIGHT OF CONFRONTATION AND CROSS-EXAMINATION

Defendant next claims he was denied his sixth amendment right to confront witnesses against him and was denied sufficient opportunity to cross-examine when the trial court admitted into evidence portions of a suppression hearing transcript of Kent Jones, a Utah probation officer, concerning the voluntariness of statements made to Jones.

Defendant attacks the admissibility of the suppression hearing transcript under 17A A.R.S. Rules of Evidence, rule 804(b)(1),[4] by asserting that there was not a similar motive to develop Jones' suppression hearing testimony, where voluntariness was at issue, as was present at trial, where guilt was at issue. Defendant maintains he desired to elicit testimony to the effect that defendant was regarded as a "snitch" at the Utah State Penitentiary. According to defendant, this testimony would have directly related to the issue of guilt since it affected favorably upon the credibility of the defendant.[5] Defendant also argues that this questioning would not have been relevant to determine whether defendant's statements to Jones were made voluntarily at the suppression hearing. We believe, however, that this line of questioning was relevant to the voluntariness hearing and was germane to the issue of whether statements to Jones were made freely in the first place. We note further that defendant did not even attempt to go into this area on cross-examination, nor did he attempt to subpoena Jones in his own defense.

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[4] Rule 804(b)(1) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

[5] Defendant relied on his fear of being labelled a "snitch" in order to explain why he gave numerous fabricated accounts as to how he came into possession of the Cadillac, which differed from defendant's testimony at trial, where he implicated an escaped Utah convict.

It is well within the trial court's discretion to decide if defense counsel had sufficient opportunity to cross-examine the witness at the prior proceeding. State v. Ray, 123 Ariz. 171, 598 P.2d 990 (1979). Absent an abuse of discretion, this judgment will not be disturbed on appeal. Because we are of the opinion that defendant had the opportunity and similar motive to develop Jones' testimony at the suppression hearing as he would have had at trial, we find the transcript testimony to have been properly admitted under the hearsay exception of rule 804(b)(1).

In raising the sixth amendment claim, defendant argues that the testimony should not have been admitted because he did not have a full and meaningful opportunity to cross-examine Jones on the issue of guilt. The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This sixth amendment right is a fundamental right made applicable to the states by the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065 (1965). A critical inquiry which arises under the sixth amendment is whether the admission of hearsay testimony by way of exception violates the command of the Confrontation Clause. Because the Confrontation Clause reflects a preference for face-to-face confrontation at trial and a primary interest secured by the clause is the right of cross-examination, Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 2537 (1980); Douglas v. Alabama, 380 U.S. 415, 418, 85 S. Ct. 1074, 1076 (1965), the clause operates to restrict the range of admissible hearsay in two ways. First, the prosecution must demonstrate the unavailability of

the declarant whose statement it wishes to use against the defendant; second, once the witness is shown to be unavailable, his prior testimony must bear some "indicia of reliability." Ohio v. Roberts, supra, 448 U.S. at 66, 100 S. Ct. at 2538-39; Marcusi v. Stubbs, 408 U.S. 204, 213, 92 S. Ct. 2308, 2313 (1972). Once the unavailability of the declarant has been established, the Supreme Court has indicated what factors must be present in order to comply with the purposes behind the confrontation requirement. Thus, in California v. Green, 399 U.S. 149, 90 S. Ct. 1930 (1970), the Court held preliminary hearing testimony admissible as against a Confrontation Clause attack, noting that (1) the declarant was under oath, (2) the defendant was represented by the same counsel who later represented him at trial, (3) the defendant had every opportunity to cross-examine the declarant, and (4) the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Id. at 165, 90 S. Ct. at 1938. If these elements are present, the transcript bears a sufficient indicia of reliability and affords the trier of fact a satisfactory basis for evaluating the truth of the prior statement. Ohio v. Roberts, supra, 448 U.S. at 73, 100 S. Ct. at 2542-43.

In the instant case, we hold that defendant was not denied his sixth amendment confrontation right when the trial court admitted the suppression hearing testimony. It is undisputed that Jones was involved in a serious accident after the suppression hearing and was unable to testify at trial. At the time his testimony was given, Jones was under oath at the suppression hearing and defendant

was represented by the same counsel who represented him at trial. Finally, defense counsel conducted a thorough cross-examination in an attempt to show that the defendant's statements were involuntary. In short, the demands of the Confrontation Clause were satisfied here.

Finally, defendant contends that the trial court erred when it allowed the reading of a written statement prepared by defendant which was given to Jones. Defendant asserts that the statement was improperly admitted because Jones was not available to provide a proper foundation for the statement. In order to prove an admission or declaration, it is necessary to show that the statement is relevant and material to the issues of the case and that the statement was, in fact, made by the declarant. See generally 29 Am.Jur.2d, Evidence, § 598. Such matters of determination are within the discretion of the trial court. See State v. Ray, supra; 17A A.R.S. Rules of Evidence, rule 104. Defendant does not dispute the genuineness of the written statement, nor does he question its relevancy or materiality. Therefore, we find no error.

PRISON RECORDS

On the last day of trial, defendant offered into evidence one page of chronological notes of his prison records made at the Utah State Penitentiary. The portion of the record which defendant sought to introduce reflected that defendant had been placed in maximum security because of his fear of being labeled a "snitch" at the prison. Defendant attempted to introduce these records in order to corroborate his professed fear of being a "snitch" as an explanation for

initially lying to investigating officers regarding how he had acquired the Cadillac. Defendant's testimony at trial tended to incriminate an escaped Utah State Prison inmate.

The entire prison record was 25 pages in length, of which defendant attempted to introduce only a small portion. The prosecutor objected to its admission, arguing that the portion sought to be introduced was taken out of context and that he had not been given an opportunity to examine the 25-page prison record. The trial court sustained the objection and defendant now maintains this ruling constituted prejudicial and reversible error.

Again, we must observe that the trial court is allowed considerable discretion in determining the admissibility of evidence and such discretion will not be disturbed on appeal unless it has been clearly abused. State v. Tulipane, 122 Ariz. 557, 596 P.2d 695 (1979); State v. Macumber, 119 Ariz. 516, 582 P.2d 162, cert. denied, 439 U.S. 1006, 99 S. Ct. 621 (1978). In this instance, the trial court acted well within its discretion by excluding the proffered exhibit.

Although the entry offered noted that defendant had requested protection because he had been labeled a "snitch," the very next entry indicated that defendant was "getting no pressure from anyone" and that "everything is going fine." Understandably, defendant did not wish to have this portion of the prison record admitted. This fact indicates the unreliability of the proffered exhibit. The trial court did not err in sustaining the State's objection.

STATE'S EFFORTS TO OBTAIN FINGERPRINTS OF THE "FRENCH PEOPLE"

After giving numerous accounts as to how he came into

possession of the victim's Cadillac and credit cards, at trial defendant admitted that all of his prior accounts were false. Defendant then testified that he was introduced to a "French couple" by escaped convict James Travis at the Roadrunner Truck Stop in Phoenix. Defendant observed the "French couple" to be very nervous and learned they were driving a new Cadillac. Suspecting the Cadillac to be stolen, defendant "conned" them into trading the Cadillac for his own stolen Ford Fairmont. The couple agreed and an exchange was made at the truck stop. At this time, defendant purportedly received a piece of paper from the "French couple" with their names and addresses in France. As related earlier, the Ford was the vehicle found abandoned north of Flagstaff. A number of unidentified fingerprints were lifted from the vehicle by Coconino County Deputy Sheriffs.

Defendant sought to verify whether any such people existed and requested the State to obtain their fingerprints from the United States Department of State. Defendant now maintains that the State did not make a good-faith effort to obtain the fingerprints, thus depriving defendant of a fair trial.

We have said:

> "[T]he state has an obligation pursuant to rule 15.1 [17 A.R.S. Rules of Criminal Procedure] to disclose such information not in its possession or under its control if the state has better access to the information; if the defendant shows that it has made a good faith effort to obtain the information without success; and if the information has been specifically requested by the defendant." State v. Smith, 123 Ariz. 231, 239, 599 P.2d 187, 195 (1979).

Defendant, relying on this statement in Smith, maintains that the United States Department of State and American Consulate

in France, being federal government agencies, were more likely to cooperate with the State than the defense and thus the State had better access to the information. We find this argument to be specious.

First, the claim that the State did not make a good-faith effort to obtain the fingerprints of the "French couple" rings hollow in view of the fact that defense counsel had informed the trial court that "[w]e have contacted the Department of Justice and the French Consulate, have made long distance calls to Paris, and reached a blank wall in any further efforts we can do to get the French people or the passports or pictures which are important. We have requested the State to do this for us. And I think they are all doing it—I think they are vigorously working on this." (Emphasis added). The prosecutor stated that he contacted the Federal Bureau of Investigation immediately after he and defendant's counsel had discussed the matter. Three weeks later, the trial court inquired how the investigation regarding the French people was coming along. Defense counsel agreed that nothing had been discovered and additionally stated that he was satisfied that all that could be done had been done.

Second, we do not view Smith as controlling here. Defendant would extend our holding in Smith so as to place an obligation on the State to seek out information requested by the defense any time another governmental body is involved. In the context of Smith, we stated that "[a]nother law enforcement authority is far more likely to cooperate with the prosecution than with defense counsel." 123 Ariz. at 239, 599 P.2d at 195. In the present case, the prosecutor contacted

the FBI in order to obtain the information requested. This inquiry proved fruitless. At this point the State did all it was obligated to do under Rule 15.1 and Smith. It did not have the obligation to conduct an extensive investigation in order to support defendant's case nor did it have an obligation to carry this inquiry any further under the flawed assumption that the State would meet with any greater success merely because it was dealing with a governmental body. Defendant does not argue that the Department of State or Consulate was uncooperative nor does he say what more the State could have done. As noted above, defendant did not complain of lack of a good-faith effort on the part of the State in the court below. With these factors in mind we conclude that defendant was not deprived of a fair trial.

PHOTOGRAPH OF THE DECEASED

Defendant complains that the trial court erred in admitting a photograph of the deceased because it was so gruesome and inflammatory that it incited the passions of the jury and prejudiced the defendant. See 17A A.R.S. Rules of Evidence, rule 403.

Trial courts have great discretion in the admission of photographs. State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, ____ U.S. ____, ____ S. Ct. ____, 66 L.Ed.2d 612 (1980). As long as the photograph has some probative value it is admissible even if inflammatory. Id. Admission is proper where the photograph aids to identify the victim, to illustrate how the crime was committed, to aid the jury in understanding testimony, and to show the location of the mortal wounds. State v. Vickers, ___ Ariz. ____, ____ P.2d ____ (No. 4765, filed June 1, 1981).

The photograph admitted at defendant's trial showed the partially decomposed corpse of the victim with a rope tied around the remains of the neck. The picture is in black and white and without close examination it is difficult to discern that the photograph is actually that of a human body. In our opinion, the photograph was not so gruesome so as to inflame or prejudice the jurors.

Further, the photograph was the only one available to show how the cord used for the strangulation was placed around the victim's neck. In addition, the photograph was used by the Yavapai County Medical Examiner in order to explain to the jury how the cord was knotted. Thus, the photograph illustrated testimony at trial and aided the jury in understanding how the crime was committed. The trial court did not abuse its discretion in admitting the photograph.

SUFFICIENCY OF THE EVIDENCE

Defendant argues that there are no probative facts to support the verdict and thus the conviction should be reversed for lack of substantial evidence.

In State v. Tison, ____ Ariz. ____, ____ P.2d ____ (No. 4624, filed July 9, 1981), we re-examined the standard of review utilized by Arizona appellate courts in determining whether there is substantial evidence to support a guilty verdict. We concluded that the approach employed in Arizona equates with the mandate in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979), requiring the reviewing court to find that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. In reaching this conclusion we stated "[o]ur review function will therefore be concerned with whether there exists substantial

evidence from the entire record from which a rational trier of fact could have found guilt beyond a reasonable doubt." State v. Tison, supra, _____ Ariz. at _____, _____ P.2d at _____.

The State's case against the defendant consisted entirely of circumstantial evidence. Defendant relies on this absence of direct evidence in arguing there were no probative facts to support the verdict. However, as we stated in Tison, supra, "[t]he lack of direct evidence of guilt does not preclude [a verdict of guilty] since a criminal conviction may rest solely upon proof of a circumstantial nature. State v. Carringer, 123 Ariz. 335, 599 P.2d 788 (1979), cert. denied, 444 U.S. 1049, 100 S. Ct. 741 (1980). It is unnecessary for the prosecution to negate every conceivable hypothesis of innocence when guilt has been established by circumstantial evidence. State v. Olivas, 119 Ariz. 22, 579 P.2d 60 (App. 1978)." _____ Ariz. at _____, _____ P.2d at _____.

After reviewing the entire record, we are of the opinion that there was sufficient evidence from which a rational trier of fact could have found guilt beyond a reasonable doubt. Without recounting every incriminating fact which would support the conviction, we observe that defendant gave numerous contradictory versions as to how he came into possession of the victim's Cadillac; denied using the victim's credit cards, and stated he had never been in Arizona until he discovered that the authorities could place him there on several occasions; personal effects belonging to the victim were found in the Ford Fairmont; a diamond ring belonging to the victim was found on Wilma Horrocks' finger; although defendant professed to have never met Larry Grove,

he apparently knew that the victim was an elderly man when stopped by the New York State Trooper; defendant testified that several items of personal property found in the Cadillac were his, although other witnesses testified that they belonged to the victim. Based upon these facts and other evidence presented by the State, we cannot say that the jury was unjustified in disbelieving defendant's version of how he acquired the Cadillac. We find no error.

JURY INSTRUCTIONS

Defendant urges that the trial court erred in failing to give a portion of defendant's requested instruction which dealt with the question of voluntariness of statements made by him to the police officers. He also contends the trial court erred in refusing to give a requested instruction which would have told the jury, in effect, that they were to exercise their individual opinions when considering the evidence.

With respect to the voluntariness instruction, defendant's counsel made no objection to the trial court's decision to omit a portion of the requested instruction. As such, defendant may not now claim error, 17 A.R.S. Rules of Criminal Procedure, rule 21.3(c), unless the error is fundamental. State v. Dickey, 125 Ariz. 163, 608 P.2d 302 (1980). We find no fundamental error here.

As to the "individual opinion" instruction, we agree with the trial court's view that this area was adequately covered by the standard instructions given by the court.

IMPOSITION OF THE DEATH PENALTY

After conducting an aggravation-mitigation hearing pursuant to former A.R.S. § 13-454(C), State v. Watson, 120

Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924, 99 S. Ct. 1254, 59 L.Ed.2d 478 (1979), and Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978), the trial judge found two aggravating circumstances, A.R.S. § 13-454(E)(1) and (2). The trial court stated:

> "1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable, namely: He was convicted of second degree murder. . . .
>
> "Number 2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person, namely: The murder committed as set forth in circumstance one above was by strangulation."

The trial judge found that the fact that the jury was given a felony murder instruction may be considered a mitigating circumstance, but went on to state that there was "no evidence or information to permit the Court to find that the murder was a mere consequence of the felony." The court also found that the fact that defendant was a model prisoner was a mitigating circumstance. In conclusion, however, the court found that these mitigating circumstances were not sufficiently substantial to call for leniency and sentenced defendant to death.

Defendant does not dispute the finding of the aggravating circumstances but disputes the trial court's finding of mitigating circumstances. Defendant contends that the following mitigating circumstances exist and are sufficient to call for leniency:

1. There is doubt of guilt for sentencing purposes.
2. Defendant is a model prisoner who gets along well in prison.
3. A felony murder instruction was given and the evidence did not show that defendant had a

"requisite intent to kill."

4. There was a lack of specific intent to cause death.

Unlike appellate review of non-capital crimes, our duty on review of the death penalty is to conduct an independent examination of the record to determine whether the death penalty was properly imposed. State v. Vickers, ____ Ariz. ____, ____ P.2d ____ (No. 4765, filed June 1, 1981); State v. Watson, ____ Ariz. ____, ____ P.2d ____ (No. 3089-2, filed April 29, 1981).

From our examination of the record, we conclude that the two aggravating circumstances were properly shown.

We agree with the trial court's finding that the giving of a felony murder instruction may be considered as a mitigating circumstance. The fact that defendant is a model prisoner may also be considered by the court. The evidence of circumstances presented by the defendant, we do not consider to be mitigating. First, we have already determined that there was sufficient evidence to support the verdict; thus, there is no merit in defendant's contention that there was doubt of guilt. Defendant's third and fourth mitigating circumstances essentially stand for the same proposition, that there was no showing of a specific intent to kill the victim.

We have recently addressed similar arguments in State v. Jordan, 126 Ariz. 283, 614 P.2d 825, cert. denied, ____ U.S.____, 101 S. Ct. 408 (1980). In Jordan we noted that when a defendant acts with the knowledge that his behavior is substantially likely to cause a result he is considered to intend that result. Id. at 288, 614 P.2d at 830.

In the present case, the victim died by asphyxiation

by ligature strangulation. We believe that it is reasonable to conclude, in the absence of any evidence to the contrary, that one who undertakes to strangle another human being, had the purpose of causing death or had the substantial knowledge death would result. Cf. State v. Jordan, supra. Defendant did not introduce any evidence to rebut this inference other than advancing a "theory" that defendant may have specifically intended only to steal an automobile and some money, but in the course of so doing, the victim may have attacked him, causing defendant to grab a rope within reach, resulting in the strangulation. In view of the fact that the victim was a 74-year-old man and the defendant was 35 at the time of the crime, we find defendant's "theory" to be implausible and insufficient to prove lack of specific intent to cause death.

After conducting our independent examination of the record and weighing the aggravating and mitigating circumstances against each other, we must agree with the trial court's determination that the mitigating circumstances are not sufficiently substantial to call for leniency. The sentence of death was properly imposed.

CONSTITUTIONALITY OF THE DEATH PENALTY STATUTE

Finally, defendant maintains that imposition of the death penalty under former A.R.S. § 13-454 is unconstitutional. First, defendant argues that the statute as applied pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924, 99 S. Ct. 1254, 59 L.Ed.2d 478 (1979), is an ex post facto law; second, that the statute is unconstitutional because it does not require the prosecution

to prove the totality of the aggravating circumstances outweigh the totality of the mitigating circumstances beyond a reasonable doubt; and finally, the statute is unconstitutional because it leaves the imposition of death to a one-man judge rather than to a jury. As defendant recognizes, we have been presented with these arguments numerous times and have rejected them. State v. Steelman, 126 Ariz. 19, 612 P.2d 475, cert. denied, ____ U.S. ____, 101 S. Ct. 287, 66 L.Ed.2d 141 (1980); State v. Jordan, supra; State v. Smith, 125 Ariz. 412, 610 P.2d 46 (1980); State v. Watson, supra.

The judgment of guilt and sentence of death are affirmed.

JACK D. H. HAYS
Justice

CONCURRING:

FRED C. STRUCKMEYER, JR.
Chief Justice

WILLIAM A. HOLOHAN
Vice Chief Justice

JAMES DUKE CAMERON
Justice

FRANK X. GORDON, JR.
Justice

APPENDIX II

(Order of Arizona Supreme Court
Denying Timely Motion for Rehearing)

Case

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

RECEIVED SEP 14 1981

September 11, 1981

STATE OF ARIZONA,

Appellee,

vs.

EDWARD HAROLD SCHAD, JR.,

Appellant.

Supreme Court
No. 4876

Yavapai County
No. 8752

The following action was taken by the Supreme Court of the State of Arizona on September 10, 1981 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing - DENIED."

Copy of Order Affirming Judgment enclosed herewith.

S. ALAN COOK, Clerk
By Kathleen E. Kenpley
Deputy Clerk

TO:
Charles Anthony Shaw, Esq., 122 North Cortez, Suite 300, Prescott, Arizona 86301
Hon. Robert K. Corbin, Attorney General, 200 West Wing, State Capitol Building, Phoenix, Arizona 85007 Attn: William J. Schafer III and David R. Cole
Charles R. Hastings, Yavapai County Attorney, Yavapai County Courthouse, Prescott, Arizona 86301
Edward Harold Schad, Jr., Box B-40496, Arizona State Prison, Florence, Arizona 85232

APPENDIX III

(Arizona Death Penalty Statute Under Which Petitioner Was Sentenced)

weapon were made voluntarily and intelligently. State v. Nunes (1973) 109 Ariz. 408, 510 P.2d 389.

Where defendant was only 15 years of age at time he committed murder, and jury at his first trial did not decree his execution, reviewing court would carefully examine propriety of death penalty decree by jury at retrial. State v. Maloney (1970) 105 Ariz. 348, 464 P.2d 993, certiorari denied 91 S.Ct. 97, 400 U.S. 941, 27 L.Ed.2d 75.

Penalty for homicide which is fixed within limitations of statute will not be revised by Supreme Court unless it clearly appears that sentence imposed is excessive and resulted in an abuse of discretion. State v. Jones (1963) 93 Ariz. 4, 378 P.2d 1019, certiorari denied 85 S.Ct. 97, 379 U.S. 852, 13 L.Ed.2d 56.

Determination of punishment in murder case is wholly within jury's discretion upon consideration of all aspects of case, and verdict must stand unless abuse is clearly shown. State v. McGee (1962) 91 Ariz. 101, 370 P.2d 261, certiorari denied 83 S.Ct. 75, 371 U.S. 844, 9 L.Ed.2d 79.

Individual views of members of Supreme Court on issues of capital punishment were irrelevant in determining whether trial court had abused its discretion in imposing death sentence, and Supreme Court was limited to judicial function of interpreting and applying the law as it found it. State v. Fenton (1959) 86 Ariz. 111, 341 P.2d 237.

§ 13-454. Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Note ½

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

Added Laws 1973, Ch. 138, § 5.

Transferred, Renumbered, and Amended

Laws 1977, Ch. 142, § 58, effective October 1, 1978, transferred this section for placement in new Title 13, Chapter 9, and renumbered it as § 13-902. Laws 1978, Ch. 215, § 2 amended this section as so renumbered, and this section is again transferred for placement in Chapter 7, and renumbered as § 13-703 by Laws 1978, Ch. 201, § 104, effective October 1, 1978.

Validity

This section was declared to be unconstitutional in the case of Richmond v. Cardwell (D.C.1978) 450 F.Supp. 519. See Notes of Decisions, post.

For severability of sentence clause, see note following section 13-452.

Former section 13-454, relating to burden on defendant of proving mitigating circumstances or excuse, was repealed by Laws 1972, Ch. 136, § 4, effective August 8, 1972.

The subject matter of former section 13-454 is now covered by this section.

Law Review Commentaries

Death penalty and Supreme Court. Arthur J. Goldberg. 15 Ariz.Law Rev. 315 (1973).

Death penalty, validity of Arizona's response to Furman v. Georgia. Ariz. State L.J., 1974, p. 357.

Supplementary Index to Notes

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Validity ½

½. Validity

Arizona death penalty statute, this section, is too restrictive regarding

Best Copy Available

APPENDIX IV

(Special Verdict)

FILED
12:30 O'Clock, P. M.
DEC 27 1973
CLARA BOYLE, Clerk
By [illegible] Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,
Plaintiff,
vs.
EDWARD HAROLD SCHAD, JR.,
Defendant.

NO. 8752

SPECIAL VERDICT

Pursuant to the requirements of A.R.S. §13-454 C; Lockett v. Ohio, 438 U.S. 586, 98 S.Ct.2955, 57 L.Ed 2d 973(1978); and State v. Watson, 120 Ariz. 441, 586 P 2d 1253(1978), this court returns this special verdict of its findings of the existence or non-existence of aggravating circumstances set forth in §13-454E and of any mitigating circumstances.

AGGRAVATING CIRCUMSTANCES

The only information which has been considered by this court relevant to any of the aggravating circumstances set forth in §13-454E is that received in evidence at the trial and that received in evidence at the sentencing hearing governed by the rules of evidence at criminal trials.

A. The court considers the statutory circumstances as follows:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable, namely:

He was convicted of second degree murder on or about December 19, 1968, in the Third District Court, Salt Lake County, Utah, Cause No. 21262, which crime was committed on or about July 4, 1968, and which was then and is now punishable

by life imprisonment under ARS §13-453.

This is an aggravating circumstance.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person, namely:

The murder committed as set forth in circumstance 1, above, was by strangulation.

To the extent that the crime in circumstance 1 can be used for circumstance 2, it is aggravating.

3. The court finds the aggravating circumstance in §13-454 E(3) is not present.

4. The court finds the aggravating circumstance in §13-454 E(4) is not present.

5. The court finds the aggravating circumstance in §13-454 E(5) is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendant received something of pecuniary value, namely the automobile, cash, credit cards and other property of the victim Lorimer Leroy Grove.

This, then, would be an aggravating circumstance.

6. The court finds the aggravating circumstance in §13-454 E(6) is not present.

The evidence shows that the victim's death was caused by asphyxiation by ligature strangulation. The ligature was a cord-like material, with the circumference of the ligature being 10.5 inches. It is as reasonable to conclude that the death was slow, torturous, horrifying and painful to the victim as it was quick and speedy dispatch. The legislature and the appellate decisions have distinguished first degree murders. The words heinous, cruel or depraved have clear meaning.

MITIGATING CIRCUMSTANCES

All information relevant to any mitigating circumstances, including, but not limited to, those set forth in §13-454 (F), contained in the presentence report, presented at the sentencing hearing, and received in evidence at the trial of the defendant has been considered by the court.

A. The court considers the mitigating circumstances as follows:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform to the requirements of law was not significantly impaired. The mitigating circumstance of §13-454(F)(1) is not present.

2. The defendant was not under unusual and substantial duress. The mitigating circumstance of §13-454(F)(2) is not present.

3. There is no evidence or information of any kind to permit the court to find the defendant's participation in the murder was relatively minor. The mitigating circumstance of §13-454(F)(3) is not present.

4. There is no evidence or information of any kind to permit this court to find that the defendant could not reasonably foresee that his conduct in the course of the commission of the offenses for which he was convicted would cause or would create a grave risk of causing death to another person.

The mitigating circumstance of §13-454(F)(4) is not present.

5. The fact that the defendant was convicted of murder and the jury was given a felony murder instruction may be considered a mitigating circumstance. However, there is

no evidence or information to permit the court to find that the murder was a mere consequence of the felony.

6. There is no mitigating circumstance as to doubt of guilt based on any testimony of the alternate juror.

7. That the defendant may have been a model prisoner as well as institutionalized may be considered a mitigating circumstance.

8. The court has considered the age of the defendant. He is 37 years old.

All references in this Special Verdict to the Arizona Revised Statutes are to the sections of those statutes as they were numbered at the time of the commission of the offense and prior to October 1, 1978.

DATED this 20th day of December, 1979.

Paul G. Rosenblatt
Presiding Judge-Division ONe

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SUPREME COURT, U.S.

No. 81-5919

THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

EDWARD HAROLD SCHAD, JR., Petitioner,

v.

THE STATE OF ARIZONA, Respondent,

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF ARIZONA

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF CHARLES ANTHONY SHAW

By Charles Anthony Shaw
Charles Anthony Shaw
122 North Cortez, Suite 300
Prescott, Arizona 86301
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Attorney for Petitioner

Petitioner brings forth to the Court's attention the recent Opinion of this Court in Eddings v. Oklahoma, United States Supreme Court No. 80-5727, decided January 19, 1982. The Opinion of this Court in this case is relevant to questions three and four of the Petitioner's Questions for Review as stated in his Petition for Writ of Certiorari in this case.

In Eddings the petitioner was convicted of first-degree murder in an Oklahoma trial court and sentenced to death. The Oklahoma death penalty statute provided that in a sentencing proceeding evidence may be presented as to "any mitigating circumstances" or as to any of certain enumerated aggravating circumstances. At the sentencing hearing, the state alleged certain of the enumerated aggravating circumstances, and the petitioner, in mitigation presented substantial evidence of a turbulent family history, of beatings by a harsh father, and of serious emotional disturbance. In imposing the death sentence, the trial judge found that the state had proved each of the alleged aggravating circumstances, but the trial judge refused, as a matter of law, to consider in mitigation the circumstances of petitioner's unhappy upbringing and emotional disturbance, and found that the only mitigating circumstance was petitioner's youth, which circumstance was held to be insufficient to outweigh the aggravating circumstances.

Citing Lockett v. Ohio, 438 U.S. 586, 606 (1978), this Court in Eddings recognized the requirement that capital punishment be imposed fairly and with reasonable consistency or not at all, and that a consistency produced by ignoring individual differences is a false consistency. This Court further held that a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence, and that the sentencer and reviewing court may determine the weight to be given relevant mitigating evidence, but may not give it no

weight by excluding it from their consideration.

In the case at bar, the trial court in its Special Verdict gave no weight whatsoever to the mitigating circumstance of doubt of guilt. Petitioner contends strenuously here that the trial court should have given some weight to this circumstance because it certainly was relevant. The Arizona Supreme Court refused to consider this relevant mitigating circumstance and thereby refused to give it any weight because there would have been sufficient evidence to sustain the verdict.

Neither the trial court in its Special Verdict nor the Arizona Supreme Court in its Opinion in the case at bar made any mention of the mitigating circumstance that the aggravating factor should have been given less weight because it was not very aggravating. In view of the holding in Eddings, this evidence should also have been considered by the sentencer and the Arizona Supreme Court.

RESPECTFULLY SUBMITTED this 5TH day of February, 1982.

LAW OFFICES OF CHARLES ANTHONY SHAW

By Charles Anthony Shaw

Charles Anthony Shaw
122 North Cortez, Suite 300
Prescott, Arizona 86301
Attorney for Petitioner

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NO. 81-5919

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

EDWARD HAROLD SCHAD, JR.,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Assuming, without conceding, that petitioner presents a bona fide confrontation claim, did the Arizona trial court violate petitioner's right to confrontation by admitting certain testimony adduced at the voluntariness hearing, where petitioner had sufficient opportunity and motivation to develope the testimony he later wished to adduce at trial?

2. Were petitioner's fourth amendment rights violated when law enforcement officers searched the car that petitioner had stolen from Leroy Grove?

3. Did the Arizona Supreme Court disallow consideration of potentially mitigating evidence, or did it merely agree with the trial court when it held that the evidence presented, when duly considered, did not constitute a mitigating circumstance?

4. Did the Arizona courts fail to consider evidence and arguments relating to petitioner's prior conviction, which conviction led to the finding of two aggravating circumstances by the trial court?

5. Did the Arizona Supreme Court violate petitioner's rights under the ex post facto clause of the United States Constitution when it 1) declared that one portion of the Arizona death penalty statute, which violated the mandates of Lockett v. Ohio, was severable from the remainder of the statute, and 2) held that petitioner was, in fact, subject to a constitutionally valid death penalty statute?

STATEMENT OF THE CASE

On August 9, 1978, the body of 74 year-old Lorimer "Leroy" Grove, a resident of Bisbee, Arizona, was found 9 miles south of Prescott, Arizona. From the the cord around what was left of the victim's neck, the medical examiner concluded that the killing was accomplished by means of strangulation.

Almost a month after this discovery, Petitioner Edward Harold Schad was arrested in Salt Lake City, Utah. At that time, petitioner was driving Mr. Grove's Cadillac. Between the time when he took the car and the time of his arrest, petitioner put several thousand miles on the car. He paid for gasoline with the victim's credit cards. Between his arrest and trial, petitioner told several highly inconsistent stories regarding how he came into possession of the victim's vehicle.

Petitioner was charged with first-degree murder in the death of Leroy Grove. The jury, following a 2-week trial, convicted petitioner of that crime. After considering the aggravating evidence adduced by the state, and the mitigating evidence offered by petitioner, the trial court sentenced petitioner to death. Petitioner appealed his conviction and sentence to the Arizona Supreme Court. That court, after considering lengthy written briefs, and hearing oral argument, affirmed petitioner's judgment and sentence on July 13, 1981. Petitioner's motion for rehearing was denied on September 10, 1981. Ninety-six days later, he filed the instant petition for writ of certiorari.

JURISDICTION

Petitioner cites Rule 20, Rules of the Supreme Court of the United States, and several cases decided by this Court

in support of his contention that, while his petition is untimely, the defect is not jurisdictional and does not prevent this Court from considering the petition. However, it appears that the cases cited by petitioner, i.e. Durham v. United States, 401 U.S. 481, 91 S.Ct. 858, 28 L.Ed.2d 200 (1971), and Taglianetti v. United States, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969), were decided pursuant to former Rule 22, not Rule 20. Rule 20, which is somewhat different from former Rule 22, implies that untimely filing may, in fact, constitute a jurisdictional defect. Rule 20.3 provides as follows:

> The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

Rule 20.1 provides that a 30-day extension may be obtained when good cause is shown. It does not appear that petitioner ever sought, much less secured, such an extension.

For these reasons, respondents respectfully request this Court to dismiss the petition for writ of certiorari for the reason that it was not filed in a timely fashion.

ARGUMENTS

I

THE ARIZONA TRIAL COURT DID NOT VIOLATE PETITIONER'S RIGHT TO CONFRONT WITNESSES AGAINST HIM.

Petitioner contends that the Arizona trial court violated his right of confrontation when it admitted testimony given at the suppression hearing by Kent Jones, petitioner's former parole officer. Respondent disagrees with petitioner's factual and legal analysis of this issue. Respondent takes the position that petitioner mischaracterizes this claim when he labels it a

"confrontation" issue. The simple fact is that appellant failed to attempt to obtain Jones' presence at trial. In order for this Court to understand respondent's approach to this claim, certain background information is essential.

On September 21, 1979, the state made a motion to continue petitioner's trial because Kent Jones had recently been involved in a bad accident. Jones had already testified at the hearing on petitioner's motion to determine the voluntariness of certain statements that petitioner had made. Petitioner's counsel, while expressing sympathy for the state's position, objected to the motion. The specific legal basis for his objection was petitioner's constitutional right to a speedy trial. Petitioner's counsel was aware that the only alternative to continuing the matter was to use the transcript from Jones' suppression hearing testimony; nevertheless, he opposed that alternative as well. On September 25, 1979, the state reasserted its motion to continue. Petitioner withdrew his objection to the motion. The state pointed out to petitioner's counsel that, because of the trial court's ruling regarding the inadmissibility of any evidence with respect to petitioner's parole status, any testimony related to that status would have to be introduced during the defense case. Petitioner's counsel agreed with that assertion. The trial court denied the motion to continue, invoking petitioner's right to a speedy trial. The file does not suggest that petitioner ever attempted to place Jones under subpoena.

In admitting Jones' prior testimony, the trial court relied upon Rule 804(B)(1), Arizona Rules of Evidence. That rule provides as follows:

> The following are not excluded by the hearsay rule if the declarent is unavailable as a witness:
>
> 1. Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party againt whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develope the testimony by direct, cross, or redirect examination.

It is undisputed that Jones was not available for trial. Even if this Court concludes that this is a legitimate confrontation question, in spite of the fact that Jones should have been subpoenaed by petitioner, the former testimony was admissible under the above rule. Furthermore, its admission did not violate this Court's pronouncements in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

Respondent concedes that the "issue" in a voluntariness hearing, as was held prior to trial in this case, is not identical to the ultimate issue at trial, i.e. the guilt or innocence of the defendant. However, the labels that are attached to these issues should not be, and are not, determinative of this question. More significant is the question whether the party who opposes the introduction of the former testimony at trial had sufficient opportunity and motive to develop the testimony at the prior hearing. United States v. Atkins, 618 F.2d 366 (9th Cir. 1980); United States v. Zurosky, 614 F.2d 779 (1st Cir. 1979) cert. denied, 446 U.S. 967 (1980). Petitioner claims that he wanted to cross-examine Jones at trial regarding the fact that petitioner was thought to be a "snitch" at the Utah State Penitentiary. This, according to petitioner, would have bolstered the credibility of his trial testimony

with respect to his explanation regarding why he made one of several inconsistent statements about his possession of Leroy Grove's car. As the Arizona Supreme Court pointed out, this line of questioning was relevant to the issues before the trial court at the voluntariness hearing. Petitioner had opportunity and similar motive to develop the testimony in question during the voluntariness hearing; therefore, his right of confrontation was not violated.

The authorities cited by petitioner do not compel the conclusion that petitioner's sixth amendment rights were violated. United States v. Wingate, 520 F.2d 309 (2d Cir. 1975), was decided strictly on the basis of the fact that the issues at the pre-trial hearing and trial were not identical. The court does not appear to have considered the question whether the testimony at issue may have been relevant both at the hearing and at trial. Here, as respondent has urged, the testimony at issue was relevant to the issues at the voluntariness hearing as well as to issues raised at trial. Moreover, in Wingate, there was no opportunity for the government to make the inquiries at the pre-trial hearing. United States v. Atkins, supra, supports respondent's position. There, the opposing party had the opportunity, but not the motivation, to ask certain questions of the witness who later became unavailable. Here, petitioner had the opportunity and the motivation, but did not avail himself of that opportunity. In United States v. Zurosky, supra, as here, the inquiries were relevant at the voluntariness hearing; for some reason, defense counsel decided not to ask the questions.

Because of the rather peculiar things that happened prior to petitioner's trial, respondent suggests that this contention entitles petitioner to no relief because it does

not even constitute a sixth amendment claim. In any event, having had sufficient opportunity and motive to make the inquiries at the pre-trial hearing, petitioner cannot now claim a violation of his right of confrontation.

II

PETITIONER'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN LAW ENFORCEMENT OFFICERS SEARCHED THE CAR THAT PETITIONER TOOK FROM HIS VICTIM, AND SEIZED VARIOUS ITEMS FROM THE CAR.

Petitioner contends, largely on the basis of this Court's holding in Robbins v. California, ____ U.S. ____, 101 S.Ct. 2841, ____ L.Ed.2d ____ (1981), that he had "standing" to contest the search of Leroy Grove's vehicle and to object to the admission, at trial, of certain items contained in that vehicle. For the first time, petitioner has specified the objects which he felt were inadmissible on the basis of a fourth amendment violation. (See Petition for Writ of Certiorari, page 14.) Nonetheless, given the facts of this case, respondent takes the position that the Arizona Supreme Court properly ruled that petitioner did not have a reasonable expectation of privacy in Leroy Groves vehicle.

When Detective Johnson, Salt Lake City Police Department, searched Grove's car on September 8, 1978, the day petitioner was arrested, his purpose was to ascertain ownership of the vehicle. This was Johnson's first contact with the vehicle; several items were removed at that time by Johnson and Detective Halterman. His only other contact with the car was on October 18, 1978, at which time he did not remove anything from the vehicle. He did not recall any other officer removing anything from the vehicle at that time. A search of a vehicle and its contents in order to ascertain the identity or the whereabouts of the

rightful owner is not improper. Waine v. State, 37 Md.App. 222, 377 A.2d 509 (1978).

As he did in the Arizona Supreme Court, petitioner places heavy reliance on Cotton v. United States, 371 F.2d 385 (9th Cir. 1967), and Simpson v. United States, 346 F.2d 291 (10th Cir. 1965). He now adds United States v. Jamerson, 549 F.2d 1263 (9th Cir. 1977). As the Arizona Supreme Court pointed out, this Court has characterized as "inexplicable" the holdings in Cotton and Simpson, in that they were apparently premised on a misinterpretation of certain language employed by this Court in Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). Rakas v. Illinois, 439 U.S. 128, 142 n.9, 99 S.Ct. 421, 429 n.9, 58 L.Ed.2d 387 (1978). Neither Cotton, Simpson, nor Jamerson supports petitioner's argument. Petitioner's statements that the search and seizure was "admittedly unconstitutional," and that he had "standing" to contest the admissibility of the items seized, are inaccurate. First, respondent has never conceded any impropriety in the officers' conduct. Second, in view of this Court's language in Rakas and its stated intent to eliminate the old "standing" concept in favor of substantive fourth amendment analysis, petitioner's statements make no sense.

With respect to petitioner's reliance upon Robbins, it is apparent that the officers in Robbins did not search the automobile, or even any of its contents, for the purpose of determining who owned the automobile. Indeed, ownership of the vehicle involved in Robbins was never an issue. Robbins does not appear to suggest that an individual can wrongfully take a car from its owner, and gain a reasonable expectation of privacy in the vehicle simply by driving it around the country for 6 weeks. In State v. Myers, 117

Ariz. 79, 570 P.2d 252 (1977), cert. denied, 435 U.S. 928 (1978), the Arizona Supreme Court held that a car thief has no reasonable expectation of privacy in a stolen vehicle. The Myers holding is not at variance with any case relied upon by petitioner. For these reasons, petitioner's fourth amendment assertions do not warrant an order granting the petition for writ of certiorari.

III

THE ARIZONA COURTS DID NOT FAIL TO CONSIDER MITIGATING EVIDENCE OFFERED BY PETITIONER.

Petitioner argues that the Arizona Supreme Court "disallowed consideration" by the sentencing authority of "doubt of guilt" as a mitigating circumstance. Petitioner's argument is premised on a misreading of the Arizona Supreme Court opinion, a misinterpretation of decisions handed down by this Court, and an apparent misapprehension of what happened in the trial court.

Respondent's reading of the Arizona Supreme Court's opinion discloses no suggestion that the court disallowed anything as a consideration in cases where the death penalty is available. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), this Court held that the sentencing authority could "not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offenses that the defendant profers as a basis for a sentence less than death." 438 U.S. at 610, 98 S.Ct. at 2967 (emphasis original). Petitioner equates this language with a pronouncement that the sentencing authority must find mitigating circumstances from the evidence presented. That is clearly not what this Court said; indeed, common sense dictates that these two

concepts--"consideration" of possible mitigating evidence and "acceptance" of the evidence as valid mitigation--are two different things. The record is clear that petitioner presented evidence and argument relating to the "doubt of guilt" theory, including the testimony of the alternate juror. Pursuant to Lockett, it was a legitimate area of inquiry. However, the trial court was not constitutionally mandated to find, nor did it find, that this theory of mitigation rose to the level of a mitigating circumstance. Twelve jurors found, beyond a reasonable doubt, that petitioner committed the crime of murder in the first degree. The alternate juror, who never examined many of the exhibits introduced at trial, and who never had the opportunity to deliberate the matter with 11 other individuals, believed that the evidence was insufficient to warrant conviction. The trial judge disagreed. The Arizona Supreme Court, in its independent examination of the record, agreed with the trial court. Petitioner's exhortations to the contrary, both Arizona courts considered the proffered evidence. The fact that neither court found that the evidence constituted a mitigating circumstance does not violate the mandate of Lockett or any known constitutional precept.

IV

THE ARIZONA COURTS DID NOT FAIL TO CONSIDER EVIDENCE OFFERED BY PETITIONER, WHICH, HE ARGUED, SUGGESTED THAT CERTAIN AGGRAVATING CIRCUMSTANCES SHOULD NOT HAVE BEEN FOUND.

Petitioner's murder of Leroy Grove was not his first violent act. In 1968, he was convicted of second-degree murder. Both of petitioner's victims were strangled. He now claims that the Arizona courts failed to consider the extent or degree of proof upon which his prior conviction

was premised. This contention is separate from the one advanced in Argument III. Argument III deals with the alleged failure of the Arizona courts to consider evidence offered in mitigation of the offense; this argument involves the alleged failure of the state courts to consider evidence that might eliminate, or at least dilute, aggravating evidence proffered by the state. Even if Lockett applies to this situation, as opposed to a situation where the defendant is precluded from offering evidence in mitigation of the offense, petitioner again equates two distinct and unequal concepts. Petitioner was not foreclosed, by the trial court or the Arizona Supreme Court, from either presenting evidence with respect to his prior conviction or arguing that the prior conviction should not be found to constitute an aggravating circumstance. The fact that neither court agreed with petitioner's argument does not mean that he was foreclosed from making this argument.

V

THE ARIZONA COURTS DID NOT VIOLATE THE RIGHTS CONFERRED UPON PETITIONER BY THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

The short answer to petitioner's argument is that the Arizona death penalty statute was never held to be unconstitutional. Part of the statute was found to violate this Court's mandate in Lockett, but the Arizona Supreme Court held that that portion of the statute was severable from the rest. State v. Watson, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978). Thus, there was a valid death penalty statute in effect on August 1, 1978, when petitioner killed Leroy Grove. The argument that the Watson Court improperly "rewrote" the death penalty statute

totally disregards the severability concept as set forth in Watson and other decisions. Petitioner has not explained, nor does respondent understand, how the Arizona Supreme Court's holding in Watson violates anything this Court said in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

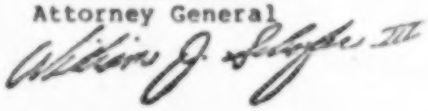
Lastly, the imposition of the death penalty does not violate petitioner's rights under the ex post facto clause of the United States Constitution. The Watson opinion was filed 12 days before petitioner committed his crime. Thus, in legal contemplation, he was on notice that the State of Arizona had the authority to seek the death penalty for persons convicted of first-degree murder. For this reason and those given above, neither the ex post facto clause, nor any of the decisions interpreting it, were violated here.

CONCLUSION

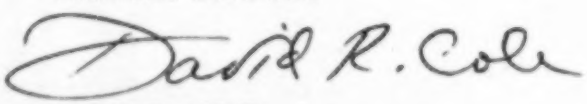
For the reasons stated, respondent respectfully requests this court to deny the petition for writ of certiorari.

Respectfully submitted,

ROBERT K. CORBIN
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WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division



DAVID R. COLE
Assistant Attorney General

Attorneys for RESPONDENTS

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

DAVID R. COLE, being first duly sworn upon oath, deposes and says:

That he served petitioner in the foregoing case by forwarding one (1) copy of RESPONDENT'S RESPONSE TO WRIT OF CERTIORARI; and also served the attorney for the petitioner in the foregoing case by forwarding two (2) copies of RESPONDENT'S RESPONSE TO WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

CHARLES A. SHAW
122 N. Cortez, Suite 300
Prescott, Arizona 86301
Attorney for PETITIONER

EDWARD HAROLD SCHAD, JR.
Box B-40496
Arizona State Prison
Florence, Arizona 85232

this 13th day of January, 1982.

David R. Cole
DAVID R. COLE

SUBSCRIBED AND SWORN to before me this 13th day of January, 1982.

Paula J. Haight
NOTARY PUBLIC

My Commission Expires:

May 17, 1983

PH-1709G